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SUBJECT: MEETING OF U.S.-EU SENIOR OFFICIALS ON DATA PROTECTION PRINCIPLES

Summary: On November 2 the USG hosted senior officials from the European Commission, Council Secretariat, the EU Counterterrorism Coordinator, and the Portuguese and Slovenian Presidencies for the second meeting of the High Level Contact Group Principals to discuss a long term solution to the growing privacy debates between the EU and the U.S. Broad agreement to press for a swift completion of the catalogue of common principles, preferably by the end of the year, was reached. EU Representatives also made welcoming overtures about seeking a formal negotiating mandate in the near future, representing a significant step forward from previous conversations. End Summary.

¶2. On November 2, DHS A/S for Policy Stewart Baker, Amb. Boyden Gray, State INL DAS Liz Verville, DOJ AAGs Fisher and Wainstein chaired a High Level Contact Group (HLCG) Principals meeting with EU officials in Washington. Principals discussed the purpose and way forward for the group's discussion of data privacy principles. A/S Baker framed the meeting around 1) the timing of the agreement, 2) the benefits the agreement will extend to either side, and 3) the procedures to be taken following the conclusion of the agreement in instances where data privacy issues arise.

¶3. A/S Baker expressed his desire that the work of the HLCG should head off future disputes like those preceding the U.S.-EU Passenger Name Record (PNR) Agreement, and expressed his conviction that such disputes had long term deleterious effects on the transatlantic relationship. Agreement on HLCG principles would eliminate these drawn out debates, and instead would enable discussions to focus on whether HLCG principles were respected. Justice, Freedom, and Security Director General Jonathan Faull agreed that the HLCG should be as ambitious as possible<sup>8</sup> in its work, and that the group should finalize its work as quickly as possible.

¶4. Faull mentioned that he would have some difficulties convincing Europeans that HLCG principles would be fair, given that the U.S. Privacy Act only applies to U.S. citizens. He understood that in practice many protections are conferred on non-U.S. citizens, but emphasized that any efforts the U.S. can undertake to reassure Europe that U.S. privacy laws, policies, and regulations will be applied to European citizens would be positive. A/S Baker noted operational difficulties in making blanket statements but did not dismiss emphasizing this point when practical. DAS Rosenzweig asked whether the difficulties Principals enumerated were problems of messaging., Principals affirmed that the equivalent application of the principles to U.S. and EU citizens alike would send a strong message.

¶5. Faull noted his desire to show &very, very substantial progress<sup>8</sup> by the end of the year. Principals agreed that the soft deadline for the group's work was the end of 2007.

¶6. Commission and Council officials headed off U.S. concerns that political agreement on the EU Data Protection Framework

Decision by the end of 2007 would negatively affect the conclusion of favorable HLCG principles. DG Faull explained that the conclusion of HLCG principles with the United States should be &highly persuasive8 to Member States as they make their adequacy determinations of the U.S., giving &considerable effect to the principles.<sup>8</sup> DG Faull also noted that a &common approach<sup>8</sup> among member states to the adequacy requirements of Article 14 of the Framework was a possibility. He emphasized that the Framework Decision would only apply to indirect data transfers, when Member State A would transfer to the United States data from Member State B.

Faull cautioned, however, that the principles are general and don't dispose of specific concerns, such as retention periods.

¶7. The Commission and Council Secretariat agreed that the Portuguese Presidency's announcement of agreement on the Framework Decision should also include statements noting the significant amount of progress achieved on HLCG principles and that the Framework Decision would not interrupt ongoing data exchanges. They also emphasized that the expected &agreement in principle<sup>8</sup> on the text of the Framework Decision by the end of the year did not mean the HLCG needed to conclude its work by the end of the year to take advantage of the grandfather clause because it could take up to two years for Member States to adopt domestic legislation implementing the EU Framework Decision. (NOTE: The EU achieved agreement in principle on November 8 at the Justice

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and Home Affairs Council meeting.)

¶8. A/S Baker inquired about the agreement's benefit for the U.S. and EU, e.g., for assuring private entities were not punished for transferring data according to legal requirements, and how conflicts would be resolved. Faull responded that EU expert level discussions on these topics had not yet taken place. Faull also insisted that current conditions prevented any binding outcome because the Commission did not currently operate under a mandate to negotiate an international agreement. However, Faull noted his willingness to seek a mandate for a binding agreement, should there be consensus that one was needed. A/S Baker affirmed the group needed to explore its options, and that he was not necessarily in favor of a binding agreement.

¶9. DG Faull noted the Canadian government's interest in a similar set of principles, and opined that the work of the HLCG could establish a model that other countries could follow. A/S Baker responded positively to this news.

¶10. The Principals agreed to continue expert level discussions, with a goal of reaching agreement on principles by the end of 2007.

¶11. Principal attendees included:

United States:

USEU Ambassador C. Boyden Gray  
DHS Assistant Secretary for Policy Stewart Baker  
DHS Deputy Assistant Secretary for Policy Paul Rosenzweig  
DHS Assistant Secretary for International Affairs Marisa Lino  
DHS Chief Privacy Officer Hugo Teufel  
DOJ Assistant Attorney General Alice Fisher  
DOJ Assistant Attorney General Ken Wainstein  
DOJ Acting Chief Privacy and Civil Liberties Officer Ken Mortensen  
DOS Deputy Assistant Secretary, INL Liz Verville

European Union

European Commission, Justice, Freedom and Security DG

Jonathan Faull

EU Counterterrorism Coordinator Gilles de Kerchove

European Commission, Head of Sector Cecilia Verkleij  
Portuguese Border Service, Assistant Director General,  
Francisco Marques Alves

Portuguese Ministry of Justice, Director, Bureau for  
International Relations, Miguel RomFo

Embassy of Slovenia, Consul, Jean-Pierre Vonarb  
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